IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2643 of 1985

For Approval and Signature:

Hon'ble MR.JUSTICE J.N.BHATT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

LAXMAN N GOL

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 2643 of 1985

MRS DT SHAH for Petitioner

MR MANKAD ASSITT.GOVT.PLEADER FOR RESPONDENTS

CORAM : MR.JUSTICE J.N.BHATT

Date of decision: 30/09/96,1-3/10/1996

ORAL JUDGEMENT

Whether termination of service of a daily rated driver who has worked for more than five years in the

Public Works department of the State of Gujarat is violative of provisions of Sections 25-F,25-G,25-H and 25-T of the Industrial Disputes Act,1947 ('ID Act') and whether it is also as a result of unfair labour practice employed by the respondent-State and whether the State has infringed the provisions of Sections 2(j),2(s), 25-D and 2(ra) of the ID Act are main questions raised in this petition under Article 226 of the Constitution of India.

A resume of material facts may firstly be stated at this stage. The petitioner came to be appointed as a driver in the office of the Deputy Executive Engineer, Sub-Division 19,Capital Project of the Public Works Department, Gandhinagar ,respondent No.2, on 21.1.1979, The petitioner thereafter continuously had worked from 1979 to 1984 as a driver. His services as a driver came to be terminated with effect from 31.1.1985.He was as such initially appointed as a daily rated driver. The order of termination of services came to be passed by respondent No.2. The case of the petitioner is that he has continuously worked as daily rated driver and he was orally assured by the employer that he will be regularised and necessary orders will be issued in due course of time. Instead of getting the order of regularising or confirming him, he received a letter of termination from respondent No.2.

The petitioner has also contended that he was taken as a driver on daily rated basis and it is also contended that he was appointed on 29 days basis with artificial intermittent breaks and thereby , he is deprived of benefit of regularisation and permanent service. The petitioner was working even on the last day of the month, but salary was not paid to show break .on record. It is in this context that the petitioner has contended that respondent-authority has exploited and has employed unfair labour practice in keeping the petitioner on daily rated basis and by showing artificial breaks on record. The petitioner is not paid any compensation or any notice pay or any monetary benefits.

It is also the case of the petitioner that following three junior drivers working on daily rated basis came to be absorbed as permanent employees by respondent No.2:

(i) Umedji Jagatji
(ii) Gulabji Thakore, and
(iii) Bachu Ravar.

The junior most employee-driver Bachu Ravar is still working as driver on the post on which the petitioner was

working before his termination. Therefore, it is contended that the impugned order of termination of his service is violative of provisions of Articles 14,16,38,39,4l and 311 of the Constitution of India and also against the provisions of Sections 25-B, 25-F, 25-G,25-H and 25-T of the ID Act.It is also submitted that Capital Project Division of Public Works Department of State is doing public utility services and, therefore, it is an Industry.

The respondents have controverted the averments made in the petition by filing affidavit-in-reply.It is inter alia contended by the respondents that the petitioner's services are legally and validly terminated and he has no right to seek extra-ordinary remedy under Article 226 of the Constitution. According to the case of the respondents, the petitioner was taken on nominal muster roll as a driver since 14.2.1979 on daily rated basis. However, the impugned order of termination came to be served on him in January 1985 as 12 trucks and trailers were rendered unserviceable. Therefore, service of the petitioner and others who could not be assigned any duty were required to be terminated. His services were terminated by serving notice of one month. The respondents have also contended that no driver working on nominal muster roll has been given appointment on permanent post on work charge establishment. The appointment to the post of driver could be given from amongst the persons whose names have been recommended either by the Employment Exchange or by Social Welfare Department. Names of such eligible persons were called for from the Employment Exchange and Social Welfare Department and after holding interview, those who were found suitable were appointed as work charge drivers.It is the case of the respondents that the petitioner could not be given any regular appointment. It is denied that the petitioner was given assurance for permanent posting. The petitioner was granted only weekly off and medical treatment and no other benefits. He was paid wages according to approved rate alongwith D.A. There has been gradual increase in D.A. and therefore, the petitioner was given rise in wages. It is denied that any single day's artificial break has been given to the petitioner. The allegation of unfair labour practice is also denied. It is also contended that the said Capital Project and the department is not an 'Industry' and therefore, the ID Act would not apply. It is also contended that no driver working on nominal muster roll has been given any regular appointment. It is also denied that the petitioner had been appointed on 29 days basis and artificial breaks were marked on every 30th day of the month. However, it

is also contended that he petitioner was appointed on daily rated basis and his absence was marked on the day he remained absent except weekly offs. It is not disputed that junior Bachu Ravar has been appointed on work charge establishment , but it is contended, after following the requisite procedure.

In counter-affidavit, the petitioner has further challenged that Bachu Ravar was initially appointed as a daily wager and subsequently, he was made permanent on work charge establishment and without following any other procedure and formality. It is also contended in the rejoinder that the petitioner was appointed on the basis of 29 days with artificial breaks and that division of R & B where he was working is an'Industry'. It is also contended by the petitioner that the respondents had not appointed anybody amongst drivers working in the project on the basis of recommendations from the Employment Exchange or from the Social Welfare Department. It is also averred by the petitioner that junior drivers like Umedsingh Jagatsinh, Gandaji Thakore and Bachu Ravar are not appointed on the basis of any recruitment rules and his case was not considered and his juniors were retained in their employment and their services were regularied and are given permanency benefits.

The following contentions are raised by the learned counsel Mrs.Shah for the petitioner:

(i) That the impugned order of termination is violative of provisions of Section 25-F of the ID Act and,therefore, it is null,void and illegal.

(ii) That while terminating the services of the petitioner,his juniors are retained in service and therefore, the impugned order isalso violative of Section 25-H and G of the ID Act.

(iii) That the petitioner is entitled to reinstatement with full back wages with all incidental benefits of continuity of service in view of unfair labour practice.

The learned Assistant Government Pleader Mr. Mankad while appearing for the respondents has raised the following contentions;

(i) That the Capital Project of Public Works Department cannot be said to be an 'Industry'. It was a sovereign function of the State.

(ii) That the petitioner cannot be said to be a 'workman' and,therefore, there would not arise any adjudication of an industrial dispute under the ID Act.

(iii) That the petitioner's services were terminated on the ground that there was no work as 12 vehicles had become unserviceable.

(iv) That the petitioner is not entitled to any relief under the ID Act.He has no right to hold the post as he was on daily rated basis and his services could be dispensed with at any time.

(v) That the petitioner is not entitled to any relief under Article 226 of the Constitution of India and whether there was any violation of provisions of Section 25-F of the ID Act or not is not a pure question of law.

(vi) That the petitioner should be relegated to other appropriate available alternative remedy under the Labour Law.

Before examining the rival versions,it would be expedient at this stage to highlight a few facts :

(i) that the petitioner came to be appointed as a driver on daily rated basis in the capital project division of R & B at Gandhinagar on 14.2.1979.

(ii) the petitioner continuously worked as a driver in the said division from 1979 to 1984'

(iii) the services of the petitioner came to be terminated with effect from 31.1.1985 after service of one month's notice.

(iv) the petitioner was paid wages according to approved rate with D.A.

(V) there had been gradual increase in the DA and,therefore, there was increase in wages of the petitioner.He was also granted weekly off and medical treatment.

(vi) junior to the petitioner one Bachu Ravar came to be retained and his services came to be regularised.

It is true that ordinarily, a workman has to pursue

regular remedy available to him under the Labour Laws when the facts are in dispute. Therefore,ordinarily,the writ court will not entertain such a petition in a case of disputed facts and when alternative efficacious remedy is available. However, in the present case, there is no such impediment or hurdle in entertaining and adjudicating the petition on hand in absence of disputed questions of facts. Thus,in view of the facts and circumstances, which are not in dispute,or without any further investigation into the facts, the controversy or dispute raised in this petition under Article 226 could be successfully resolved. In the circumstances emerging from the record of the present case, it would not be expedient and desirable to relegate the petitioner to the remedy under the Labour law and that too after 11 years of legal battle in this court. For all these reasons, this court is inclined to entertain the present petition under Article 226. With the result, the objection with regard to maintainability of petition under Article 226 of the Constitution is required to be rejected.

Again, the contention that the petition is not maintainable under Article 226 of the Constitution of India , as alternative remedy is available is not acceptable in view of the peculiar facts and special circumstances emerging from the record of the case. It is true that alternative remedy under Labour Law is available. Ordinarily, when efficacious alternative remedy is available, the court would not like to entertain the petition exercising the extraordinary, equitable, special,prerogative writ jurisdiction wherein the scope of judicial review is also circumscribed. However, it may be remembered that notwithstanding availability of alternative remedy, court can interfere in a given case if exceptional and extra-ordinary circumstances so arise. There is no ban or bar against exercise of jurisdiction when alternative remedy is available. Discretion vests in the High court to entertain a petition notwithstanding existence of such alternative remedy. This proposition of law is also very well celebrated and established since long. The apex court as early as in 1961 in A.V.Venkatswaran vs. R.S.Wadhwani,AIR 1961 SC 1506 has clearly held that despite existence of alternative remedy, it is open for the High court to exercise discretion to entertain a petition under Article 226 of the Constitution in a given case.Not availing alternative remedy does not disqualify or disentitle the petitioner consideration of his petition.

Again the petition came to be admitted after hearing the

respondents in 1985.More than a decade has passed. Therefore, it is not proper to dismiss the petition on the technical ground of availability of alternative remedy and to relegate the petitioner to pursue alternative remedy which again may take a decade or so. In case of nullity or order which is void ab initio or any ultra vires order, alternative remedy cannot be allowed to constitute a bar to entertain the petition and when the action under challenge is manifestly unjust,patently illegal, ex-facie null and void, the High court could entertain the petition despite existence of alternative remedy.In " Maheshkumar Chauhan vs.Prantij Municipal Borough,1996 (1) GLH 951, a petition was directly entertained though alternative remedy was available in view of the facts and circumstances of the case. The contention threfore that this petition is not maintainable is rejected.

Next brings into sharp focus, the question whether Capital Propject Division of Public Works Department(later on R & B) can be said to be an 'Industry' as contemplated by Section 2(j) of the ID Act. As a sequitur to this plea, it was also urged that if respondent No.2 is not running any industry, then, the petitioner who was working under him at the relevant time would not become a workman as contemplated under Section 2(s) of the ID Act. In order to resolve this dispute and controversy, it would be necessary and appropriate to have a close look at the relevant provisions of the ID Act. The very long title of the ID Act shows that it is designed for resolution of industrial disputes. Expression 'industrial dispute' is statutorily defined by Section 2(k) which prescribes that any dispute or difference between employer and employer , or between employers and workmen, or between workmen and workmen which is connected with the employment or the terms of employment or with the conditions of labour,of any person. Along with the definition in Section 2(j) and Section 2(s),it forms the basic frame work of the ID Act. The dispute or difference; to come within the purview of the ID Act must be'industrial' that it must relate to'Industry' as defined in section 2(j) of the Act. A private dispute or a dispute between parties in an establishment which does not constitute industry within the meaning of the ID Act is not an industrial dispute within the meaning of Section 2(k).

Section 2(k) reads as under :

"'industrial dispute' means any dispute or

difference between employers and employers,or between employers and workmen or between workmen and workmen,which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person".

It could very well be seen that four following ingredients are required to be established so as to fall in the definition of industrial dispute under Section 2(k):-

(a) There should be a dispute or difference,
(b) The dispute or difference should be between employer and employer or between employer and workmen or between workmen and workmen.
(c) The dispute or difference must be connected with the employment or conditions of labour and
(d) of any person.

There is no dispute about the fact that the respondents are employers and respondent No 2 had employed the petitioner as a daily rated driver in his division of Capital Project of Public Works Department ,as Deputy Executive Engineer. The question is -whether the petitioner is a workman. For that purpose, definition of expression 'workman' is required to be noted. Section 2(s) reads as under "

"2(s). 'workman' means any person (including an apprentice) employed in any industry to do any manual,unksilled, skilled, technical,operatinal, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied,and for the purpose of any proceeding under this Act in relation to an industrial dispute,includes any such person who has been dismissed,discharged or retrenched in connection with,or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute,but does not include any such person-

(i) who is subject to the Air Force Act,1950 (45 of 1950) or the Army Act,1950 (46 of 150) or the Navy Act, 1957(62 of 1957)'; or

(ii) who is employed in he police service or as an officer or other employee of a prison,or

(iii) who is employed mainly in a managerial or

administrative capacity' or

(iv) who,being employed in a supervisory capacity,draws wages exceeding one thousand six hundred rupees per mensem or exercise,either by the nature of the duties attached to the office or by reason of the powers vested in him,functions only of a managerial nature".

The definition of workman,along with the definition of 'Industry' and industrial dispute' forms the basic tripod on which the super structure of the ID Act rests. The present definition was substituted by he I D` Amendment Act,1982, and contains a few drafting changes,but the same would not affect the merits of the case.It could very well be seen from the aforesaid definition of 'workman' that the fact of employment or existence of employer-employee relationship must be clearly established before the status of workman within the meaning of definition under Section 2(s) is claimed. It is an essential condition of a person being a workman within the term of the definition that he should be employed to do work in an industry. In other words, there should be employment of his by the employer and that there should be relationship of employer-employee or between master and servant. Then, he is a workman. Such employment or establishment must be an industry as defined under the ID Act.

Section 2(j) defines 'industry'. It would,therefore, be necessary at this stage to refer the said term. Section 2(j) reads as under :

"2(j) 'industry' means any business, trade undertaking, manufacture or calling of employees and includes any calling, service,empoyment, handicraft or industrial occupation or avocation of workmen."

The definition pin points two essential ingredients of industry- employer and body of workmen. The definition thus has two limbs: in the first part, the approach is from the aspect of an employer and the definition talks of business, trade,undertaking,manufacture or calling of employer. The underlying design and purport obviously is all these terms connote an activity with common and similar characteristics.The second part of the definition talks of calling,service, employment, handicraft or industrial occupation or a vocation of workmen. The purpose of the ID Act is very comprehensive. As observed above, it is in two parts;one part defines it from the

standpoint of the employer and the other from the standpoint of the employee. If an activity falls under either part of the definition,it will be an industry within the meaning of section 2(j). The history of industrial disputes and the legislation recognizes the basic concept that the activity shall be an organised one and not that which pertains to private or personal employment. The regal functions prescribed as primary and inalienable functions of State though statutorily delegated to a corporation are necessarily excluded from the purview of the definition. Such regal functions shall be confined to legislative power, administration of law and judicial power. If a service rendered by an individual or a private person would be a an industry it would equally be an industry in the hands of a corporation. If a service rendered by a corporation is an industry, the employees in the departments connected with that service,whether financial,adminisrative,or executive would be entitled to the benefits of the Act.

If a department discharges many functions,some pertaining to industry as defined in the Act and other non-industrial activities, the predominant functions of the department shall be the criterion for the purposes of the Act. Industrial disputes revolving around the connotation of the term industry under Section 2(j) of the ID Act came up on several occasions for judicial review but no consensus on the scope of the term has so far been evolved. The industrial activity involved in the disputes ranged from municipal services, research institutions,charitable organisations,religious and philanthropic trusts,commercial bodies like chambers of commerce, professional associations such as those of solicitors,educatinal bodies like University, hospitals including charitable ones and Government and semi-Government agencies.Profit motive seemed the test in some cases while nature of activity such as analogous to trade or industry,as these terms are popularly understood,appeared to be the criteria in some others. The landmark judgment of the Honourable apex court on the definition of 'industry' in Section 2(j) was rendered in "Bangalore Water Supply and Sewerage Board vs. A.Rajappa," 1978 (l)LLJ 349 where the question was whether the Bangalore Water Supply Board of the Bangalore Municipal Corporation was an industry. The said question had come up in connection with an application under Section33-C of the ID Act.The decision rendered in that judgment of the Honourable apex court is very important. It was observed in the said case -

"It behoves us hopefully to abolish blurred edges, illumine penumbral areas, and overrule what we regard as wrong. We proceed to formulate the principles deducible from our discussion,which are decisive,positively and negatively,of the identify of an industry under the Act.We speak not exhaustively but to the extent,authoritativey,until over-ruled by a larger Bench or superceded by the legislative branch"

The Honourable Supreme court in its judgment in "Bangalore Water Supply case (supra) reviewed what it called 'The rather zigzag cure of the landmark cases and the tangled web of judcial thought that have perplexed one branch of industrial law viz. the basic concept of industry under the Act".

After reviewing the historical background of law as it developed in the earlier cases, the apex court formulated its views on the connotation of the term industry in Section 2(j) in the following propositions:

(a) where systematic activity organized by cooperation between employer and employee, the direct and substantial element is clerical ; for the production and/or distribution of goods and services calculated to satisfy human wants and wishes not spiritual or religious but inclusive of material things or services geared to celestial bliss i.e. making on a large scale of 'prasad' or food prima facie there is an industry in that enterprise.

(b) absence of profit motive or gainful objective is irrelevant, be the venture in the public,joint,private or other sector.

(c) the true focus is functional and the decisive test is the nature of the activity with special emphasis on employer-employee relations'

(d) if the organisation is a trade or business it does not cease to be one because of philanthropy animating the undertaking.

The petitioner was working as a driver on daily rated basis in Capital Project Division of Public Works Department at Gandhinagar. Considering the observations and guidelines in various judicial pronouncements of the apex court, this court in "P.W.D. Employees' union vs.

State, 28(2) GLR 1070 has held that irrigation department of the PWD is an industry. It is observed in the said Division Bench case that merely because the legislative power in respect of National Highways or for that matter State highways is left to the Union or the State Governmment, it would not become such a function that it can be treated as sovereign function strictly understood.It cannot be claimed to be a function akin to the legislative function or judicial function or one akin to the defence of the State or Union.It is further observed that it is difficult to conceive that such an activity can be organised otherwise than by co-operation between employer and employees and in any case, the purpose of such activity is anything else but for the production of services for the welfare of the people so as to enable them to carry on their agriculture and other allied activities in an economic and efficient manner.It was clearly held that concerned irrigation and allied activity in connection therewith is welfare activity or economic adventure undertaken by the Government as contradistinguished from sovereign functions stricto senso. Thus,Public Works Department (Irrigation) was held to be an 'industry' and the employees working or serving or rendering their service in such department were held to be workmen as defined under Section 2(s) of the ID Act.

There is no dispute about the fact that the petitioner was working as daily rated driver in Sub-division 19 of the Capital Project,Gandhinagar of the Public Works Department. The petitioner worked from 14.2.1979 to 20.12.1984 continuously as a daily rated driver. Respondent No.2 's office has also issued a certificate in this behalf which also says that the petitioner has rendered service with hard work and he is a man of good character. Certificate dated 3.1.1985 is issued by respondent No.2. The sub division in which the petitioner was working as a driver is a part of the Capital Project Division office of Public Works Department. There is no dispute about the fact that Capital Project Division or Department of Public Work Department has been doing building construction , road construction and any other allied activities for the welfare of the society and for providing good facilities within the area covered under it. .Thus the concerned department of the Government has been providing public utility and material services.

Expression 'material service' has been interpreted by the Supreme court in "Management,Safdarjung Hospital vs. K.S.Sethi" ,1970 (2) LLJ, 266 as involving an activity

carried on by cooperation between employers and employees to provide the commmunity with the use of electric power,water, transportation,mail delivery, telephone and the like. In providing these services there may be employment of professional men, but the emphasis is on the productivity of service organised as an industry but not on what the professional men do.Thus, the services of professional men such as doctors,lawyers,solicitors etc.which benefit individuals according to their needs is something different from material services which is not only of commercial character but also brings into existence something beneficial to public. It is productive of this something which is described as 'material service'.

The transport undertaking run by the State is also held to be an industry providing material services. The transport branch of the concerned sub division of the Capital Project which is part and parcel of the Public Works Department has been providing such material services. The very name 'Public Works Department' would clearly go to show that they are engaged in planning,preparing the bridges, roads etc. and implementing works relating to public welfare. Therefore, the Capital Project sub division where the petitioner was working is part and parcel of the Public Works Department providing material services and public ustility is nothing but an 'industry.'

After the landmark pronouncement of the Honourble Supreme court in Bangalore Water Supply case (supra), the question to be asked was not what is the industry but it is,what is not industry ? Despite several and series of case laws in various judicial pronouncements , it has not been possible to evolve a simple and straight formula for determining as to what activity is an industry and what is not. With the result, a Judge is left with no alternative but to raise his hand in helplessness. Till then, the courts have to take into consideration various fact and circumstances and the relevant case law.

The ID Act in terms contemplates cases of industrial disputes where Government or local authority or public utility concern may be employers.Expansion of Governmental or municipal activities in the field of productive industry is a feature of all developing welfare States. This is considered necessary because it leads to welfare without exploitation of workmen and makes the production of material goods and services cheaper by eliminating profit.

In light of the relevant proposition of law and the material case law, the functions of the State can be divided into four categories:

1 the sovereign or the regal functions of the State which are the primary and inalienable rights of a constitutional Government;

2. economic adventures clearly partaking of the nature of trade and business undertaken by it as part of its welfare activities;

3. organized activity not stepped with the total indicia of business yet bearing a resemblance to or being analogous to trade and business, and

(4) the residuary organized governmental activity which may not come within the ambit of the aforesaid three categories.

Out of the aforesaid categories, the second and the third would obviously fall within the concept of definition of 'industry'. The undisputed activities of the State with reference to construction, establishment and maintenance of roads,National and State Highways,construction of Guest houses and Rest Houses, water supply and also construction of dams,bridges, canals and providing subsidised or controlled rate food ,definitely fall within the definition of 'industry'.The aforesaid activities would clearly satisfy the test laid down by the Honourable Supreme court in Bangalore Water Supply case (supra).

In view of the aforesaid judicial pronouncements, the courts have evolved certain principles to determine whether a particuar activity of Government or Municipal Corporation would fall within the definition of 'industry' or not of which the following are relevant:

(i) The regal functions described as primary and inalienable functions of State though statutorily delegated to a Corporation are necessarily excluded from the purview of the definition. Such regal functions shall be confined to legislative power,administration of law and judicial power.

(ii) if a service rendered by an individual or a private person would be an industry,it would equally be an industry in the hands of a Corporation.

(iii) If a service rendered by a Corporation is an industry, the employees in the departments

connected with the service whether financial,administrative or executive,would be entitled to the benefits of the Act.

(iv) If a department discharges many functions some pertaining to industry as defined in the Act and other non-industrial activities, the predominant functions of the department shall be the criterion for the purpose of the Act.

In the case of Gurmail Singh vs. State of Punjab,reported at (1991)1 SCC 189, it has also been held that running of tubewell by the State is an 'industry'.Thus,running of tubewells by the State is held to be an 'industry' whether in the hands of the Government or in the State or whether in the hands of Municipal Corporation. Irrigation department of State of Punjab is held to be 'industry' within the meaning of section 2(j) of the ID Act as per the decision of the Honourable Supreme court in the case of reported in the case of Des Raj vs. State of Punjab,reported in AIR 1988 SC 1182.

In "Chief Conservator of Forests vs. Jagannath Maruti ,(1996) 2 SCC 293,the Constitution Bench has lucidly explained and expounded the principle in relation to the definition of 'industry' as in Section 2(j). It is held that the dichotomy of sovereign and non-sovereign functions of the State does not really exist. Whether a particular function of the State is or is not a sovereign function,depends on the nature of the power and manner of its exercise.In that case,Pachgaon Parwati scheme in Pune district and social foresting work in Ahmednagar district undertaken by Forest department of the State Government was held to be covered by the definition of 'industry' under Section 2(j). It was clearly observed-

"The scheme in question cannot be regarded as a part of inalienable or inescapable function of the State for the reason that the scheme was intended even to fulfil the recreational and educational aspirations of the people.There can be no doubt that such a work could well be undertaken by an agency which is not required to be even an instrumentality of the State."

It is in this context that it was observed that the said scheme cannot be regarded as a sovereign function of the State.

There is no dispute about the fact that capital project scheme of the Public Works Department of the State is

engaged in the construction,maintenance of roads, water supply, better sanitary facilities,providing residential accommodation to the employees,constructing Circuit houses s ,Guest huose,Rest houses and also providing subsidised or approved regulated food therein and various other public welfare and utility services. Therefore,it cannot be gainsaid that the said division of the Capital Project wherein the petitioner was working as daily rated driver which is integral part of the Public Works Department is falling definitely within the definition of the term 'industry' as enshrined in Sectino 2(j) of the ID Act. Therefore,the contention raised on behalf of the respondent-State that the said division of the Public Works Department is not 'industry' cannot be accepted.

Section 2(s) prescribes and describes who is a workman. It could very well be seen from the definition of 'workman' that there are four ingredients in the definition.

1. Nature of relationship.
2. field of activity.
3. type of work performed and
4. nature of compensation.

Type of employment or existence of employer-employee\ relationship must be clearly, proved before status of workman within the meaning of definition of Section 2(s) is claimed. There is no dispute about the fact that the petitioner was employed in the transport division in the department of the Capital Project of the Public Works Department. The said division and department is held to be an industry. Therefore, there no manner of doubt that the petitioner is a workman in terms of Section 2(s). Therefore, respondents are employers.

There is no dispute about termination of employment of the petitioner. It would obviously be an industrial dispute. Section 2(k) defines the term 'industrial dispute'

It could very well be seen from a plain perusal of Section 2(k) that the dispute raised by the petitioner who is a workman is an industrial dispute. Along with definition of Section 2(j) and 2(s), it forms the basic fram work of ID Act. Therefore, if the petitioner proves that there is some breach of provisions of the ID Act, he is entitled to relief.

Chapter V-A prescribes provisions for lay-off and retrenchment. This chapter is very important for the

welfare of labour activities.Various safeguards are provided to prevent unfair labour practice and harassment to oppressed,suppressed,depressed and downtrodden class like labour. In this Chapter,there are 13 important Sections from Sections 25-A to Sections 25-J. Section 25-J provides that Sections 25-C to 25-E shall not apply to certain industrial establishments inclusive of the said provisions and on the basis of number of workmen on average and also on the basis of nature of activities. There is also exclusion of those provisions in some case on statutory basis.

Section 25-B defines what is continuous service.The concept of continuous service is a fiction created under the ID Act in order to distribute benefits of compensation in cases of lay off, retrenchment, transfer or closure of industrial establishment. It must be remembered that it may be established that there was continuous service as defined in Section 25B before a workman can claim any benefit under Chapter V-A. It is in this context that sub-section (1) of Section 25-B does not pose any problem. Sub-section (2) of Section 25-B is a bone of contention. Thus,there is fictional concept of continuous service.

Section 25-C provides right of a workman who is laid off for compensation. Section 25-D provides for duty of an employer to maintain muster rolls of workmen. Section 25-E provides that workman is not entitled to compensation in certain cases. Section 25-F provides conditions precedent to retrenchment of workmen. We are vitally concerned with the provisions of Section 25-F in the present case. It,therefore, requires elaboration. Section 25-F reads as under :

"25-F. No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

(a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired,or the workman has been paid in lieu of such notice, wages for the period of the notice.

(b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months,and

(c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official gazette.'.

It could be very well visualised from the aforesaid definition that it confers invaluable privilege or right on industrial labour. Employment in industry is predicated upon complex economic factors many of which are beyond the control either of an employer or of an employee. In times of difficult economic circumstances, labour is usually the first casualty.It is in this context that the legislature in its wisdom has rightly provided Section 25-F which saves a workman either from being surprised out of a job, or from being thrown to the wolves without any succour or relief.The conditions in Section 25-F are very relevant and material. They must be complied with first before effecting retrenchment. Section 2(oo) defines when a termination of service constitutes retrenchment under the ID Act. Section 2(oo) has, in recent years, been widened so such by decisions of the courts that almost every termination of service, barring the statutory exceptions in Section 2(oo) of a person, who comes within the definition of Section 2(s), is deemed to be retrenchment.

Section 25-F clearly provides that no workman employed in any industry who has been in continuous service for not less than one year under an emmployer,shall be retrenched by the employer until certain conditions are observed. These conditions are-

(a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice,wages for the period of the notice'

(b) the workman has been paid,at the time of retrenchment,compensation which shall be equivalent of fifteen days' average pay,for every completed year of continuous service or any part thereof in excess of six months and

(c) notice in he prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette.

The service of the petitioner has been terminated with effect from 3l.1.1985 on the ground that his services are no longer required by giving one month's notice dated 27.12.1984.The petitioner is found to be a workman under Section 2(s) and respondents are the employers and the dispute and difference between the workman and the employers is nothing but an industrial dispute as defined in Section 2(k).It is also not in dispute that the petitioner has continuously worked from 21.1.1979 to 3l.1.1985. The petitioner thus has completed more than five years' service period and also more than 240 days in the last year. Keeping in view the definition of continuous service given in Section 25-B and the relevant proposition of law, the petitioner is fulfilling all criteria entitling him to claim protection of Section 25-F. The contention that the petitioner was not permanent or regular employee but he was working on daily rated basis and therefore, he is not entitled to protection of Section 25-F and other benefits under the ID Act,is totally meritless.

Whether the object of continuing employees like the petitioner as casuals or on daily rated basis for years was to deprive them of the status of permanent employees or benefits of statutory provisions of the ID Act. is not required to be proved by the petitioner. Onus to prove should not be placed on the workman. It can rather be inferred from the facts of the case. On the admitted facts, it could safely be inferred that continuing the petitioner on daily rated basis as driver for a period of six years and terminating him unceremoniously without observing the statutory requirements is nothing but an unfair labour practice on the part of the respondent-State. It is really not only surprising but shocking that the State which has proclaimed social welfare policies and which is wedded to welfare State philosophy is indulging in unfair labour practice.

Section 25-T speaks about prohibition of unfair labour practice. No employer or workman or a trade union,whether registered under the Trade Unions Act ,1926 or not, shall commit any unfair labour practice. The objection of provisions of Section 25-T is to prevent certain unfair labour practices and the same would be frustrated if a workman is burdened to prove the alleged act of unfair labour practice.From the material on record,this court is satisfied that the petitioner had been kept on daily rated basis for a long period of six years in all probability and presumably with the primary object of depriving him of status of a regular or permanent employee inasmuch as giving him a status would

have required the employer to pay the workman at a rate higher than the one prescribed in the Minimum Wages Act. Of course, in the present case, relief of regularisation and permanency is not in focus.

Insofar as question of appreciation of unfair labour practice is concerned, a reference may also be made to the provisions of Section 2(ra) which provides as to what is the meaning of unfair labour practice. It says that unfair labour practice means any of the practices specified in the Fifth Schedule. It is very clear from the Fifth Schedule under the ID Act under clause 10 that it is unfair labour practice to employ workmen as 'badli' casuals or temporaries and to continue them as such for years,with the object of depriving them of the status and privileges of permanent workman. It could safely be presumed from the facts emerging from the record of the present case that there is clear violation of provisions of clause 10 of the Fifth Schedule read with Section 2(ra) and Section 25-T of the ID Act and explicit and manifest exercise of unfair labour practice requiring interference of this court by resorting to extra-ordinary, equitable ,prerogative writ jurisdiction under Article 226 of the Constitution of India.

The contention raised on behalf of the State that the case is covered by the provisions of Section 2(oo)(bb) is also without any merit. Provisions of Section 2(oo)(bb) read as under :

"(oo)'retrechment' means the termination by the employer of the service of a workman for any reason whatsoever,otherwise than as a punishment inflicted by way of disciplinary action,but does not include-

(a) voluntary retirement of the workman; or

(b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; or

(bb) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein."

The contention that the impugned order of termination of

service is saved and protected by the provisions of Section 2(oo)(bb) is meritless. The exception occurring in clause (bb) of Section 2(oo) is limited to those cases where the work of temporary character was over. Only in those circumstances, the employer can employ workmen with bona fide and genuine intention for satisfying the need and those cases obviously would fall within the excepted category. Section 2(oo)(bb) has to be read as a whole and construed in light of the underlying design and spirit of the Act meant for avoiding exploitation of workmen in the garb of contractual obligations or in the garb of daily rated payment as appearing in the exceptional class. This is the only restricted category of exceptional class which can yield intended result and provide security for a particular class appearing in Section 2(oo) of the Act.

Even with intermittent breaks, once an employee completes 240 days of service and if his last letter of appointment or renewal contains the automatic clause, stipulating the termination of his service, the right accrued to the employee cannot be taken away by employing the exception clause of (bb). It would still be retrenchment.Whereas in the present case, the petitioner was appointed without any specific or specified tenure or period, no terms and conditions are placed on record. No appointment letter seems to have been issued. The petitioner continued for a long spell of six years in service as a driver on the basis of daily rated wages and his services came to be terminated without observing statutory requirements. It cannot be said that the case is covered by exceptions provided in clause (bb). Termination of service for any reason whatsoever are the key works. Whatever the reason, every termination spells retrenchment.A termination takes place where a term expires either by the active step of the master or the running out of the stipulation term. To protect the weak against the strong,this policy of comprehensive definition has been effectuated.Termination embraces not merely the act of termination by the employer but the fact of termination,howsoever produced . May be, the present one be a hard case, but one has to visualise abuse or misuse by the employer by suitable verbal devices ,circumventing the armour of Section 25-F and Section 2(oo) and mentioning the said words in the appointment order.The amendment came into force by introducing clause (bb) in Section 2(oo) on August 18,1984, whereas the termination order came to be passed with effect from 31.1.1985. Therefore, in the present case, even while taking into consideration the amended section, the proviso in its spirit has been brought from Section25-F(a) to the

exception clause in Section 2(oo)(bb), but it does not take away its effect.

It must be remembered that an employer,more so in case of a model employer like the State, cannot steal away the employee's umbrella provided by Sections 2(oo), 24B read with Section 25-F of the ID Act by serving an employee the last letter of his appointment or the renewal with the stipulation of termination of service under the contract,so as to bring the termination within the excepted category and to snatch it out of the excepted purview of retrenchment Needless to state that Section 2(oo)(bb), 25-F (a) ought to be read together as a whole.

Law is a social engineering to remove the existing imbalance and to further the progress,serving the needs of the Socialist ,Democratic Republic of India,under the Rule of Law.In law, the deprivation of employment must be in accordance with the procedure prescribed under the statutory provisions,rules, regulations or the instructions. Rule of Law which permeates our Constitution warrants that it must be followed subtantially and procedurally. It could very well be seen from the record of the present case that in the present case, the termination of the petitioner is nothing but retrenchment and it clearly manifests unfair labour practice. It also does not fall within the excepted category so as to take out termination from retrenchment.Therefore,though the petitioner was appointed on daily rated nominal muster roll employee, he had put in more than 240 days of work in a calendar year and he was found to have worked from February 1979 to January 1985. Therefore, he is entitled to protection under the ID Act and there is obviously no bar of provision of Section 2(oo)(bb). In the opinion of this court, having taken into consideration the provisions of Sections 2(j), 2(s),2(d) and Section 2(oo)(bb), the petitioner is found entitled to benefits under Section 25-F of the ID Act. His services are wrongly terminated and it is nothing but manifest employment of unfair labour practice by the Government which is never expected of a model employer like the State.

The Supreme court in Chief Conservator of Forests (supra) has clearly held that social forest department is an industry covered under the definition of Section 2(j). In "Gammon India vs Niranjan Dass," (1984) 1 SCC.509, the Honourable Supreme court has held that termination of service not falling within exceptions (a),(b) and (c) of Section 2(oo) amounts to retrenchment irrespective of

nature of employment. It is also observed that termination on the ground of reduction in volume of business amounts to retrenchment. One month's notice of such termination cannot be treated as notice under Section 25-F(a). In absence of compliance with prerequisites of Section 25-F, the retrenchment bringing about the termination would be an ab initio void. The respondent-State has raised contention that on account of disposal of trucks and other vehicle , services of the petitioner were not necessary. This contention is not supported by any material on record. Otherwise also, it is found from the facts on record that one junior employ Bachu Ravar is retained and he has been appointed on work charge establishment. The explanation given by the respondent-State is that it is done after following the requisite procedure.Even if it is believed to be true,no explanation is given as to why it could not be done in the case of a senior driver like the petitioner. It may be noted that there is statutory procedure even for retrenchment. Section 25-G lays down procedure for retrenchment. It contemplates retrenchment of workmen classified according to categories. Section 25-G reads as under:

"Where any workman in an industrial establishment who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf,the employer shall ordinarily retrench the workman who was the last person to be employed in that category,unless for reasons to be recorded ,the employer retrenches any other workman".

It could very well be seen from the aforesaid provisions that procedure prescribed for retrenchment in Section 25-G is applicable to person who is-

(a) a workman within the meaning of section 2(s) of the I.D.Act.

(ii) worked in an industrial establishment as defined in Section 2(ka) of the ID Act'

(iii) citizen of India, and

(iv) belongs to a particular category of workmen in that establishment.

There are two principles for retrenchment prescribed under this Section - voluntary and statutory. Retrenchment made by the respondent authority is also not

falling within the statutory principle of Section 25-G.The procedure laid down in Section 25-G read with Rule 81 of the I.D.(Bombay) Rule 1957 corresponding to Rule 77 of the I.D.Central Rules states that employer is not obliged to give reasons if the employee happens to be junior in the rank.If he is not the last to be employed, he must assign reasons for departure from the last come,first go rule and record the same in the notice of retrenchment.What is prohibited by Section 25-G is preferential treatment given to juniors sacrifices the recognised principle in Industrial law-first come last go'. This court has no hesitation in finding that the departure made by the respondents in passing the impugned order is not justified and therefore, the impugned order is also violative of provisions of Section 25-G. Therefore, there is no hesitation in holding and finding that termination of service of the petitioner by virtue of the impugned order amounts to retrenchment which is not legal and justified and therefore, the petitioner is entitled to all benefits of the I.D.Act since the impugned order is passed in violation of provisions of Section 25-F and 25-G. The ratio explained and propounded by this court in Maheshkumar Chauhan vs. Prantij Municipal Borough,1996(l) GLH 851 is attracted to the facts of the present case. It is held in the said case that even in case of daily wagers who have completed 240 days or more ,oral termination without complying with provisions of Section 25-F is illegal and such case is not covered by Section 2(oo)(bb). It would be appropriate to make reference to the observations made by the Honourable Supreme court relating to service contract in "Central Inland Water Transport Corporation vs. Brojo Nath",AIR 1986 SC 1571. On interpretation of the relevant service rules, it is held that the rule empowering the Government Corporation to terminate services of its permanent employees by giving notice or pay in lieu of notice period is opposed to public policy and violative of Article 14 and directive principles contained in Articles 39(a) and 4l. Bearing in mind the said principle and the provisions of Sections 25-F,25-G,25-H,the impugned order whereby the services of the petitioner came to terminated by giving one month's notice is illegal and void ab initio.Giving of one month's notice without complying with provisions of Section 25-F will not validate the action of the authority. If no compliance is made of provisions of Section 25-F,then despite service of notice of one month before termination of service ,it is illegal and unjustified.

In "State Bank vs.N.S.Money,"AIR 1976 SC 1111,it has been

held that "Termination... for any reason whatsoever' in Section 2(oo) are the key words. Whatever the reason.every termination spells retrenchment. So, the sole question is has the employee's service been terminated? Verbal apparel apart,the substance is decisive. A termination takes place where a term expires either by the active step of the master or the running out of the stipulated term. Termination embraces not merely the act of termination by the employer but the fact of termination howsoever produced.

In a Division Bench judgment of this court in' Sarabhai Chemicals vs. Subhash Pandya",1984 GLH 713,it was held that even in case of Badli worker who worked for 240 days ,it was sufficient to bring him within the scope of Section 25F read with Section 25-B and,therefore, it was found that retrenchment of such Badli workman without complying with Section 25F is illegal and,therefore, it was quashed.

In the present case, it is found that this is not a case covered by Section 2(oo)(bb). This is not a case of termination of service as a result of non-renewal of contract of construction between the employer and workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein.

Having regard to the facts and circumstances and considering the relevant provisions of law, this court has no hesitation in finding that the impugned order of termination is illegal, unjustified and 'void - abinitio' and,therefore,it is required to be quashed and set aside.

The next question which falls in sharp focus is as to while setting aside the termination order and while making the order for reinstatement, what order should be made for payment of back wages. Whether a workman or employee of the statutory authority should be reinstated in employment with or without full back wages or to what extent of payment of back wages ,obviously is a question of fact in a given case depending upon the fact from the evidence on record. The court is obliged to take into consideration various facts and circumstances .Taking into consideration the relevant facts and circumsmtances,it would be just and reasonable to award payment of 25% back wages in this case.

IN THE RESULT, the petition is allowed with cost which is quantified at Rs.2,500/-. The impugned order or termination dated 27.12.1984 at Annexure A is quashed and

set aside and the respondents are directed to reinstate the petitioner within a period of four weeks from the date of writ of this court with 25 % back wages and with all consequential benefits of continuing service.

A parting thought may be necessary . Recipient of back wages, large sum of money or large lump sum compensation are quite inexperienced in the handling of such large sum of money or funds. They may dissipate such funds or likely to face a prey of confidence or may even invest in reckless, imprudent enterprise or financial institution or organization.

It is,therefore,incumbent upon a court under benevolent and beneficial law proceedings to ensure that the amount awarded in such cases is not being frittered away.If large sum of arrears or lump sum compensation is sqaundered away, which will in all probabilities, be against the socio-economic objective and the purpose of the provision of benign labour legislation intended to be achieved. Therefore,looking to the poor class of workmen,their minor children or widows, as the case may be, who would not have strict fiscal discipline and to scotch the complaints of malapplication and at times misappropriation of such funds, following guidelines shall be beneficial and in the best interest of the subject and in consonance with the object of relevant labour legislation.

Out of the above arrears of back wages, 75% of amount shall be deposited or invested in any Nationalised Bank or UTI schemes or any other high rate of interest yielding scheme of the Governmenr or Government owned and managed Corporations initially for a period of 5 years. The interest which shall accrue due, therefrom, shall be periodically paid to the workman. However, workman shall not be entitled to create any charge or encumbrances or take any loan in part or whole without previous permission of concerned Labour court . It is also clarified that concerned Labour court will be at liberty to permit withdrawal by the workman or encash prematurely deposits upon an application in that behalf made by the workman and if Labour court is satisfied that such withdrawal is necessary for urgent,emergent and unforeseen circumstances.

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